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No. 14-1458

IN THE

Supreme Court of the United States

MHN GOVERNMENT SERVICES, INC., AND
MANAGED HEALTH NETWORK, INC.,
Petitioners,

v.

THOMAS ZABOROWSKI, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF *AMICI CURIAE* ATLANTIC LEGAL FOUNDATION AND THE INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether Federal law preempts California's severability rule applicable only to agreements to arbitrate, even when the agreement contains an express severability clause, and when California law applies a different rule of contract severability to other types of contracts.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, *amici curiae* Atlantic Legal Foundation and International Association of Defense Counsel state the following:

Atlantic Legal Foundation is a not for profit corporation incorporated under the laws of the Commonwealth of Pennsylvania. It has no shareholders, parents, subsidiaries or affiliates.

The International Association of Defense Counsel is a non-profit professional association. It has no parent company and no shareholders.

TABLE OF CONTENTS

QUESTION PRESENTED. i
CORPORATE DISCLOSURE STATEMENT. . . ii
TABLE OF AUTHORITIES. iv
INTEREST OF *AMICI CURIAE*. 1
PRELIMINARY STATEMENT. 4
SUMMARY OF ARGUMENT. 10
ARGUMENT. 12
The Decisions Below Are Inconsistent With The Federal Arbitration Act and This Court's Teaching on the Enforceability of Arbitration Agreements. 12
CONCLUSION. 25

TABLE OF AUTHORITIES

Page(s)

Cases

14 Penn Plaza LLC v. Pyett,
556 U.S. 247, 266 (2009). 24
Adair v. Stockton Unified School Dist.,
77 Cal.Rptr.3d 62 (Cal. App. 2008).. 15
Allan v. Snow Summit, Inc.,
59 Cal.Rptr.2d 813 (Cal. Ct. App. 1996).... 17
Allied-Bruce Terminix Cos. v. Dobson,
513 U.S. 265 (1995). 14
American Express Co. v. Italian Colors Restaurant, 133 S. Ct. 2304 (2013)... 3
Armendariz v. Found. Health Psychcare Servs., Inc., 6 P.3d 669 (Cal. 2000).... *passim*
AT&T Mobility LLC v. Concepcion,
131 S. Ct. 1740 (2011). . . . . *passim*
Baeza v. Superior Court, 135 Cal.Rptr.3d 557
(Cal. Ct. App. 2011). 20
Birbower, Montalbano, Condon & Frank v. Super. Ct., 949 P.2d 1 (Cal. 1998)... 16
Broughton v. Cigna, 988 P.2d 67 (Cal. 1999).. 19
Buckeye Check Cashing, Inc. v. Cardegna,
546 U.S. 440 (2006). 13, 14
Carmona v. Lincoln Millennium Car Wash, Inc., 171 Cal.Rptr.3d 42
(Cal. Ct. App. 2014). 22

Chavarria v. Ralph's Grocery Co.,
733 F.3d 916 (9th Cir. 2013). 7, 9
Circuit City Stores, Inc. v. Adams,
532 U.S. 105 (2001). 19, 21
Cruz v. PacifiCare Health Systems, Inc.,
66 P.3d 1157 (Cal. 2003). 19
Dean Witter Reynolds Inc. v. Byrd,
470 U.S. 213 (1985). 21
DIRECTV, Inc. v. Imburgia, No. 14-462. . 3, 10
Doctor's Assocs., Inc. v. Casarotto,
517 U.S. 681 (1996). 14
Ellis v. U.S. Sec. Assocs., 169 Cal.Rptr.
3d 752 (Cal. Ct. App. 2014). 7
GAR Energy & Associates, Inc. v.
Ivanhoe Energy Inc., No. 1.11-CV-00907 (AWI),
2011 WL 6780927 (E.D. Cal. Dec. 27, 2011),
report and recommendation adopted,
2012 WL 174952 (E.D. Cal. Jan. 20, 2012).. 20
Gilmer v. Interstate/Johnson Lane Corp.,
500 U.S. 20 (1991). 15, 24
Green Tree Fin. Corp.-Ala. v. Randolph,
531 U.S. 79 (2000). 19, 21
Hedges v. Frink, 163 P. 884 (Cal. 1917). 15
Herskowitz v. Apple Inc.,
940 F. Supp. 2d 1131 (N.D. Cal. 2013). 20
Higgins v. Superior Court,
45 Cal.Rptr.3d 293 (Cal. Ct. App. 2006). . . . 18
In re Marriage of Facter, 152 Cal.Rptr.3d 79
(Cal. Ct. App. 2013). 15

Ingle v. Circuit City Stores, Inc.,
328 F.3d 1165 (9th Cir. 2003). 8
Lhotka v. Geographic Expeditions, Inc.,
104 Cal.Rptr.3d 844 (Cal. Ct. App. 2010). . . 23
Little v. Auto Stiegler, Inc.,
63 P.3d 979 (Cal. 2003). 16
Lona v. Citibank, N.A.,
134 Cal.Rptr.3d 622 (Cal. Ct. App. 2011). . . 20
Marathon Entertainment, Inc. v. Blasi,
174 P.3d 741 (Cal. 2008). 15
Marin Storage & Trucking, Inc. v.
Benco Contracting & Engineering, Inc.,
107 Cal.Rptr.2d 645 (Cal. Ct. App. 2001). . 17
Marmet Health Care Ctr., Inc. v. Brown,
132 S. Ct. 1201, 1203-04 (2012). 13-14
Martinez v. Master Prot. Corp.,
118 Cal.App.4th 107,
12 Cal.Rptr.3d 663 (2004). 17
Mitsubishi Motors Corp. v. Soler
Chrysler–Plymouth, Inc.,
473 U.S. 614 (1985). 13, 24
Moses H. Cone Mem'l Hosp. v. Mercury
Constr. Corp., 460 U.S. 1 (1983). 13
Nagrampa v. Mailcoups, Inc.,
469 F.3d 1257 (9th Cir. 2006). 17
Nitro-Lift Techs., L.L.C. v. Howard,
133 S. Ct. 500 (2012) (*per curiam*). 14-15
Oblix, Inc., v. Winiecki, 374 F.3d 488
(7th Cir. 2004). 21

Oguejiofor v. Nissan, 2011 WL 3879482
(N.D.Cal. 2011).. . . 20
Olsen v. Breeze, Inc.,
55 Cal.Rptr.2d 818 (Cal. Ct. App.1996). . . . 17
Parada v. Super. Ct., 98 Cal.Rptr.3d 743
(Cal. Ct. App. 2009). 23
Perry v. Thomas, 482 U.S. 483 (1987). . . . 14
Pinnacle Museum Tower Assn. v.
Pinnacle Market Development (US), LLC,
282 P.3d 1217 (Cal. 2012). . 23
Rent-A-Center, West, Inc. v. Jackson,
561 U.S. 63 (2010). 12
Samaniego v. Empire Today LLC,
140 Cal.Rptr.3d 492,
(Cal. Ct. App. 2012). . . . . *passim*
Sanchez v. Valencia Holding Co. LLC,
Cal. Sup. Ct. (2015), Cal. LEXIS 5292).. . . . 20
Shearson/Am. Express Inc. v. McMahon,
482 U.S. 220 (1987). 13, 24
Southland Corp. v. Keating,
465 U.S. 1 (1984). 14
Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.,
559 U.S. 662 (2010). 12
Symcox v. Zuk,
34 Cal.Rptr. 462 (Cal. Dist. Ct. App. 1963). 15
Volt Info. Scis., Inc. v. Board of Trs. of
Leland Stanford Jr. Univ.,
489 U.S. 468 (1989). 12, 21

Statutes

California Code of Civil Procedure § 1021..... 8
California Civil Code § 1599..... 15
California Civil Code § 1717 (b)(1)..... 8
Cal. Civil Code § 1751.. 20
Cal. Civil Code § 1781..... 20
Federal Arbitration Act,
9 U.S.C. §§ 1, *et seq*..... ... . .. *passim*
Federal Arbitration Act, 9 U.S.C. § 2..... 3, 13

Other Sources

1 Witkin, Summary of Cal. Law Contracts,
§ 422 (10th ed. 2005). 15

INTEREST OF *AMICI CURIAE*[1]

The Atlantic Legal Foundation is a non-profit public interest law firm founded in 1976 whose mandate is to advocate and protect the principles of less intrusive and more accountable government, a market-based economic system, and individual rights. It seeks to advance this goal through litigation and other public advocacy and through education. Atlantic Legal Foundation's board of directors and legal advisory committee consist of legal scholars, corporate legal officers, private practitioners, business executives, and prominent scientists. Atlantic Legal's directors and advisors are familiar with the role arbitration clauses play in the contracts entered into between companies and between companies and consumers. Some of Atlantic Legal's directors and advisers have decades of experience with arbitration – as legal counsel, as arbitrators, and as members or

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[1] Pursuant to Rule 37.2(a), all parties have consented to the filing of this brief. The consents have been lodged with the Clerk.

Pursuant to Rule 37.6, *amici* affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution to the preparation or submission of this brief.

supporters of organizations that administer arbitration regimes. They are familiar with the benefits of arbitration, especially the role of arbitration (and other "alternative dispute resolution" mechanisms) in facilitating business and commerce and in alleviating the burdens on courts and parties.

The International Association of Defense Counsel ("IADC"), established in 1920, is an association of approximately 2,500 corporate and insurance attorneys from the United States and around the globe whose practice is concentrated on the defense of civil lawsuits. The IADC is dedicated to the just and efficient administration of civil justice and continual improvement of the civil justice system. The IADC supports a justice system in which plaintiffs are fairly compensated for genuine injuries, culpable defendants are held liable for appropriate damages, and non-culpable defendants are exonerated and can defend themselves without unreasonable cost. In particular, the IADC has a strong interest in the fair and efficient administration of class actions as well as arbitrations, both of which are increasingly global in reach.

The abiding interest of *amici* in the benefits of arbitration is exemplified by their participation as *amicus* and as counsel for *amici* in several cases concerning Federal arbitration law, including, *inter*

alia, *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013) and, recently, *DIRECTV, Inc. v. Imburgia*, No. 14-462, currently before the Court.

Amici believe that the decisions of the Court of Appeals for the Ninth Circuit and the district court in this case are inconsistent with the Federal Arbitration Act, 9 U.S.C. §§ 1, *et seq.* ("FAA") and *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011) in which this Court held that the FAA means exactly what it says: Agreements to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."(*Id.* at 1745, quoting 9 U.S.C. § 2). The FAA preempts state laws that expressly disfavor arbitration agreements. The FAA also preempts "generally applicable contract defenses," which purport to apply to all contracts, but which in practice apply "only to arbitration" or that "derive their meaning from the fact that an agreement to arbitrate is at issue," *(id.* at 1746) or which "have a disproportionate impact on arbitration agreements." (*Id.* at 1747).

PRELIMINARY STATEMENT

In this case the parties agreed to arbitrate their disputes, and they agreed that if any particular terms of the agreement were deemed by a court to be invalid or unenforceable, the court should sever those terms and enforce the remainder of the agreement.

Petitioners are military contractors who contract with the Department of Defense to provide military service members and their families with confidential life-skills counseling. Consultants who work for petitioners, including respondents Zaborowski and Baldini, are independent, highly-trained, and well-educated professionals who hold graduate degrees and professional licenses that require advanced training. Pet. 4-5.

Respondents signed a contract, the Provider Services Task Order Agreement (hereafter the "Agreement"), which contains a section captioned "**Mandatory Arbitration**" in bold and underlined typeface written in the same type font and type size as the rest of the contract. The arbitration provision requires that the parties confer in good faith to resolve any problems or disputes that may arise under the Agreement as a condition precedent to any arbitration demand by either party, and that any controversy or claim arising out of or relating to the Agreement, or breach

thereof, shall be settled by final and binding American Arbitration Association arbitration in San Francisco, California before a single, neutral arbitrator who is licensed to practice law to be chosen by the consultant (called the "Provider") from a list of three neutral arbitrators provided by MHN. The Mandatory Arbitration clause further states that the parties waive their right to a jury or court trial. The Arbitration clause also stipulates that the decision of the arbitrator shall be final and binding, and that the arbitrator shall have no authority to make material errors of law, to award punitive damages, to add to, modify or refuse to enforce any agreements between the parties, or to make any award that could not have been made by a court of law. The Arbitration clause also provides that the prevailing party, or substantially prevailing party's costs of arbitration, are to be borne by the other party, including reasonable attorney's fees. Pet. 5-7; Pet. App. 56a-57a.

The Agreement also contains an express severability clause, captioned "**Severability**", which, like the arbitration clause, is in the same typeface and type size as the rest of the Agreement and provides that if "any provision of this Agreement is rendered invalid or unenforceable . . . the remaining provisions of this Agreement shall remain in full force and effect." Pet. 7, Pet. App. 5a.

Respondents filed a putative class-action lawsuit in district court against Petitioners, alleging violations of the Fair Labor Standards Act. Pet. 7. Petitioners moved to compel arbitration, which Respondents opposed. The district court, applying California law, concluded that multiple terms in the arbitration agreement were unconscionable. Pet. 8, Pet. App. 17a-28a. The district court refused to sever the purportedly unconscionable provisions of the arbitration clause. The district court noted that, under California law, a court may decline a request to sever a contract when the contract "is permeated by unconscionability" Pet. App. 29a (internal quotation marks omitted). The court invalidated the entire arbitration agreement, holding that "[t]he finding of 'multiple unlawful provisions' allows a trial court to conclude that 'the arbitration agreement is permeated by an unlawful purpose'" and to deny severance. *Id.* (quoting *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 697 (Cal. 2000)).

A divided panel of the Ninth Circuit affirmed. The majority of the panel agreed with the district court that multiple provisions of the arbitration agreement were unconscionable. Pet. 8, Pet. App. at 2a-4a.

First, the panel held, the arbitrator-selection clause is substantively unconscionable because it

gives MHN the "power to control arbitrator candidates" citing *Chavarria v. Ralph's Grocery Co.*, 733 F.3d 916, 923-26 (9th Cir. 2013) Pet. App. 3a. But, as the panel itself acknowledged, the Agreement requires that those arbitrators be "neutral." *Second*, the panel held that the Agreement's six month limitations period is substantively unconscionable because, given the nature of plaintiffs' claims, the limitations period works as a "practical abrogation of the right of action," citing *Ellis v. U.S. Sec. Assocs.*, 169 Cal.Rptr.3d 752, 757 (Cal. Ct. App. 2014). Pet. App. 3a.

Third, the costs-and-fee-shifting clause, which awards fees and costs to the "prevailing party, or substantially prevailing party[]," is, in the panel's view, "substantively unconscionable" because it results in an "unreasonable" and "unexpected" allocation of risks, citing *Samaniego v. Empire Today LLC*, 140 Cal.Rptr.3d 492, 497 (Cal. Ct. App. 2012) because even if plaintiffs prevail on some of their claims but not all, they may still be required to pay MHN's attorney's fees and costs; this provision, the panel wrote, is contrary to the applicable statutory cost-shifting regimes provided by California and federal law, which entitle only the prevailing plaintiff to an award of costs and fees. The effect of this fee-award clause, the Panel said, deters employees from seeking vindication of

their rights by pursuing arbitration. Pet. App. 4a. However, California Code of Civil Procedure § 1021 provides that "[e]xcept as attorney's fees are specifically provided for by statute, the measure and mode of compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties." Moreover, California Civil Code § 1717 (b)(1) provides that "the party prevailing on the contract shall be the party who recovered a greater relief in the action on the contract," a concept quite similar to the Agreement's "substantially prevailing party" language. *Finally*, the panel held, the "filing fees and punitive damages waiver" provisions are "substantively unconscionable" because the American Arbitration Association's filing fee hampers the employee more than it does MHN, and the punitive damages waiver "improperly proscribes available statutory remedies" afforded to plaintiffs bringing employment claims. Pet. App. 4a, citing *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1179 (9th Cir. 2003). The filing fee and punitive damages waiver provisions are facially neutral. The specifics of the filing fee provision are, of course, unique to arbitration, and to that extent

the panel's decision does not rest on a defense "generally applicable" to all contracts.[2]

The Circuit Court panel also upheld the district court's denial of severance. The panel majority relied on *Samaniego,* 140 Cal.Rptr.3d at 501 which held: "An arbitration agreement can be considered permeated by unconscionability if it 'contains more than one unlawful provision . . . Such multiple defects indicate a systematic effort to impose arbitration . . . not simply as an alternative to litigation, but as an inferior forum that works to the [stronger party's] advantage.'" Pet. 8-9; Pet. App. 5a.

The panel majority rejected MHN's preemption arguments as "foreclosed by" Ninth Circuit precedent, and held that the severability analysis was not "impermissibly unfavorable to arbitration." Pet. App. 5a-6a (citing *Chavarria*, 733 F.3d at 926-27.

Circuit Judge Gould dissented. Judge Gould wrote that *Armendariz* was decided more than a decade before the Supreme Court's decision in

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[2] In some respects, arbitration is more accessible to individual plaintiffs than court litigation; for example, arbitration procedures usually limit discovery, which is frequently prolonged and expensive. Indeed, the Agreement at issue circumscribes discovery. *See* Agreement, § 20, Pet. App. 56a.

Concepcion and that "[t]he reasoning in *Armendariz* that multiple unconscionable provisions will render an arbitration agreement's purpose unlawful has a disproportionate impact on arbitration agreements' and should have been preempted." Pet. App. 8a (quoting *Concepcion*, 131 S. Ct. at 1747). Judge Gould further observed that "*Concepcion* and its progeny should create a presumption in favor of severance when an arbitration agreement contains a relatively small number of unconscionable provisions that can be meaningfully severed and after severing the unconscionable provisions, the arbitration agreement can still be enforced." *Id.*

Remarkably, the Ninth Circuit panel majority seemed to ignore entirely this Court's holding in *Concepcion*, which it cited not once.

The Ninth Circuit denied further review. Pet. 10, Pet. App. 31a.

SUMMARY OF ARGUMENT

California courts routinely display the very hostility to arbitration that the FAA was designed to end. Indeed, this case, and other cases, such as *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011) and *DIRECTV v. Imburgia*, No. 14-462, presently before the Court, demonstrate that California law, whether construed by state courts or by federal courts sitting in California, is

frequently in conflict with the language and purpose of the FAA and this Court's FAA jurisprudence.

In construing and enforcing contracts generally, California courts honor severability provisions, and do not invalidate the entire agreement unless doing so would be impossible without rewriting the agreement or unless the core purpose of the agreement is illegal. In construing agreements to arbitrate, however, California courts hold that the existence of more than one invalid provision can be interpreted by a court to indicate that the "stronger party" sought to use arbitration as a tool to take advantage of the "weaker party," not as legitimate alternative to litigation. California courts thus can refuse to sever the "offending" contract clauses and, instead, invalidate the entire arbitration agreement. This, we submit, shows a clear bias against arbitration.

The Ninth Circuit's decision upholding California's unconscionability/non-severability rule is contrary to binding precedent of this Court construing the FAA as favoring arbitration and precluding state law that is inimical to arbitration.

ARGUMENT

THE DECISIONS BELOW ARE INCONSISTENT WITH THE FEDERAL ARBITRATION ACT AND THIS COURT'S TEACHING ON THE ENFORCEABILITY OF ARBITRATION AGREEMENTS

Amici urge this Court to reverse the Court of Appeal's decision and reaffirm this Court's holdings in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010), and numerous other cases, which recognize the overriding Congressional policy favoring arbitration.

This Court has repeatedly held that the "fundamental principle [is] that arbitration is a matter of contract," *Concepcion*, 131 S. Ct. at 1745 (quoting *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 67 (2010)); *see also Stolt-Nielsen*, 559 U.S. at 681; *Volt Information Scis., Inc. v. Board of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 479 (1989), and that courts must enforce arbitration agreements according to their terms, *Volt*, 489 U.S. at 478; *Stolt-Nielsen*, 559 U.S. at 682; *Concepcion*, 131 S. Ct. at 1748.

The FAA, and FAA section 2 in particular, was intended to 'revers[e] centuries of judicial hostility to arbitration agreements,' by 'placing arbitration

agreements upon the same footing as other contracts.'" *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 225-226 (1987) (citing *Scherk v. Alberto-Culver Co.*, 417 U. S. 506, 510-11 (1974).

The FAA reflects "a 'liberal federal policy favoring arbitration.'" *Concepcion*, 131 S. Ct. at 1745 (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983); *Buckeye Check Cashing Inc. v. Cardegna*, 546 U.S. 440, 443 (2006)."[A]s a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration," *Moses H. Cone*, 460 U.S. at 24-25 & n.32; *Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc.*, 473 U.S. 614, 626 (1985). California courts often ignore these precepts.

State courts may refuse to enforce arbitration agreements only "upon such grounds as exist at law or in equity for the revocation of any contract," 9 U.S.C. § 2. But even state laws purporting to apply to all contracts are preempted by the FAA if they "have a disproportionate impact on arbitration agreements." *Concepcion*, 131 S. Ct. at 1747. Thus, preemption applies when a "generally applicable contract defense" in practice applies "only to arbitration" or "derive[s] [its] meaning from the fact that an agreement to arbitrate is at issue." *Id.* at 1746; *see also, e.g., Marmet Health*

Care Ctr., Inc. v. Brown, 565 U.S. ___, 132 S. Ct. 1201, 1203-04 (2012); *Rent-A-Center*, 561 U.S. at 67-68; *Preston v. Ferrer*, 552 U.S. 346, 356 (2008); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443-44 (2006); *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687-88 & n.3 (1996); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 270-71 (1995); *Perry v. Thomas*, 482 U.S. 483, 492-93 n.9 (1987)[3]; *Southland Corp. v. Keating*, 465 U.S. 1, 16 & n.11 (1984).

The California law at issue here – which encourages courts to void arbitration agreements that contain clauses that are deemed "unconscionable," rather than to sever the offending provisions and preserve the essence of the agreement to arbitrate – is preempted by federal law. The state court decisions on which the courts below rely evince a strong aversion to parties' rights to contract for arbitration and the continued "judicial hostility towards arbitration" that the FAA was intended to foreclose. *Nitro-Lift Techs., L.L.C. v. Howard*, 133 S. Ct. 500, 503

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[3] In *Perry*, the Court said that the FAA's preemptive effect might extend even to grounds traditionally thought to exist "'at law or in equity for the revocation of any contract.'" *Id.*, at 492, n. 9 (emphasis deleted), and that a court may not "rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable. . ." *Id.*, at 493, n. 9.

(2012) (*per curiam*), quoting *Concepcion*, 131 S. Ct. at 1745, 1747, 1757; *see also Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991).

California courts generally enforce valid portions of a contract that has some unenforceable provisions: "It is settled that where a contract has both void and valid provisions, a court may sever the void provision and enforce the remainder of the contract." *Adair v. Stockton Unified School Dist.*, 77 Cal.Rptr.3d 62 (Cal. Ct. App. 2008) (employment contract), citing California Civil Code § 1599. This has been the rule for a century, and remains so today. *See Hedges v. Frink*,163 P 884, 885 (Cal. 1917); *Symcox v. Zuk*,34 Cal.Rptr. 462, 466 (Cal. Dist. Ct. App. 1963); *In re Marriage of Facter*, 152 Cal.Rptr.3d 79, 95 (Cal. Ct. App. 2013); *see also* 1 Witkin, Summary of Cal. Law Contracts, § 422, at 463-464 (10th ed. 2005) and cases cited therein.

A court will commonly determine severance is appropriate unless "the central purpose of the contract is tainted with illegality." *Marathon Entertainment, Inc. v. Blasi*, 174 P.3d 741, 754 (Cal. 2008). If the central purpose of the contract is tainted with illegality, then the contract as a whole cannot be enforced. On the other hand, if the illegality is collateral to the main purpose of the contract, and the illegal provision can be excised

from the contract by means of severance or restriction, then such severance and restriction are appropriate. *See Little v. Auto Stiegler, Inc.*, 63 P.3d 979, 985-86 (Cal. 2003). Only "[i]f the court is unable to distinguish between the lawful and unlawful parts of the agreement" may the court invalidate the entire contract. *Birbower, Montalbano, Condon & Frank v. Super. Ct.*, 949 P.2d 1, 12 (Cal. 1998).[4] In *Birbrower*, the California Supreme Court was dealing with attorney's fees – both fixed fee and contingency fee arrangements – and held that nothing in the nature of the agreement was an obstacle to severance. It directed the trial court to determine, on remand, whether a partially valid agreement existed, and, if so, what value should be attributed to legally provided services. *Birbrower*, 949 P.2d at 12-13. The central purpose of the Agreement in this case, and of the arbitration provision of it, cannot be said to be tainted with illegality.

Under California law, almost any arbitration agreement between an employer and a non-union employee would be deemed unconscionable and unenforceable because of the "unequal" bargaining

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[4] Judge Gould, in his dissent below, showed that one can readily distinguish between the lawful and allegedly unlawful parts of the Agreement, excise the unlawful parts, and still preserve the essence of the agreement to arbitrate. Pet. App. 8a-10a.

power of the parties.[5] *See Martinez v. Master Prot. Corp.*, 118 Cal.App.4th 107, 114, 12 Cal.Rptr.3d 663 (2004) ("An arbitration agreement that is an essential part of a 'take it or leave it' employment condition, without more, is procedurally unconscionable)," cited in *Nagrampa v. Mailcoups, Inc.*,469 F.3d 1257 (9th Cir. 2006) (arbitration clause in franchise agreement unenforceable because of unequal bargaining power of franchiser and franchisee). However, the relative bargaining power of the parties, which is the rationale for disfavoring arbitration provisions in employment or consumer contracts, is not always decisive. California routinely enforces limited warranties and other terms found in other types of form contracts. *See, e.g., Marin Storage & Trucking, Inc. v. Benco Contracting & Engineering, Inc.*, 107 Cal.Rptr.2d 645 (Cal. Ct. App. 2001) (indemnification); *Olsen v. Breeze, Inc.*, 55 Cal.Rptr.2d 818 (Cal. Ct. App. 1996) (release); *Allan v. Snow Summit, Inc.*, 59 Cal.Rptr.2d 813 (Cal. Ct. App. 1996)(promise to accept risk of injury and to hold ski resort harmless).

But California courts treat arbitration agreements differently, and impose on form arbitration clauses more or different requirements

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[5] Sometimes called "contracts of adhesion."

from those imposed on other contract clauses.[6] One of the cases on which the Ninth Circuit panel relied extensively, *Armendariz*, creates special requirements and establishes special hurdles for arbitration agreements. It applies a bright-line rule disfavoring severability and favoring nullification in the context of arbitration agreements when there is none in the context of ordinary contracts, and thus the FAA would preempt this decision for its bias against agreements to arbitrate. Because *Armendariz* treats arbitration clauses more unfavorably than other types of contracts, under *Concepcion* it is preempted.

California courts treat arbitration agreements quite differently and exhibit the very suspicion of and hostility towards arbitration this Court has

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[6] Unlike many such contracts, the arbitration and severability provisions of the contracts between MHN and respondents were in the same type size as all other parts of the document and the title of the section was set out in bold type. There was no attempt to hide or minimize those provisions. Moreover, respondents and other consultants are highly-educated professionals, well able to understand the agreement they signed. In *Samaniego,* the plaintiffs were low-level manual laborers, not proficient in English, *see* 140 Cal.Rptr.3d at 498; *see also Higgins v. Superior Court*, 45 Cal. Rptr.3d 293 (Cal. Ct. App. 2006) (the parties to an agreement to appear in reality television program were young and unsophisticated).

denounced. *Samaniego*, for example, holds that when an "arbitration agreement contains more than one unlawful provision," that fact by itself "indicate[s] a systematic effort to impose arbitration on an employee not simply as an alternative to litigation, but as an inferior forum that works to the employer's advantage." *Samaniego*, 140 Cal.Rptr.3d at 501 (Cal. Ct. App. 2012), cited by the Ninth Circuit panel, Pet. App. 5a. *See also Broughton v. Cigna*, 988 P.2d 67, 78 (Cal. 1999) ("The judicial forum has significant institutional advantages over arbitration in administering a public injunctive remedy, which as a consequence will likely lead to the diminution or frustration of the public benefit if the remedy is entrusted to arbitrators."); *Cruz v. PacifiCare Health Systems, Inc.*, 66 P.3d 1157, 1163 (Cal. 2003) ("Arbitration cannot necessarily afford all the advantages of adjudication in the area of private attorney general actions, that in a narrow class of such actions arbitration is inappropriate, and that this inappropriateness does not turn on the happenstance of whether the rights and remedies being adjudicated are of state or federal derivation," and that this Court's decisions in *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79 (2000) and *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001) do not weaken the California court's holding in *Broughton*.)

It is noteworthy that while some California cases seem to acknowledge that *Armendariz* has been "abrogated in relevant part on other grounds" by *Concepcion*, the Ninth Circuit panel did not. For example, recently the California Supreme Court in *Sanchez v. Valencia Holding Co. LLC*, (2015) Cal. LEXIS 5292) applied *Concepcion* to strike down provisions of the California Consumer Legal Remedies Act (CLRA) (Cal. Civil Code Sections 1751 and 1781) which provide for class action litigation and which declare the right to a class action to be unwaivable as preempted by the FAA. The court specifically noted *Concepcion*'s holding, "that a state rule invalidating class waivers interferes with arbitration's fundamental attributes of speed and efficiency, and thus disfavors arbitration as a practical matter." *See also, e.g.*, *Herskowitz v. Apple Inc.*, 940 F. Supp. 2d 1131, 1144 (N.D. Cal. 2013), *Oguejiofor v. Nissan*, 2011 WL 3879482 at *8 (N.D.Cal. 2011), *Baeza v. Superior Court*, 135 Cal.Rptr.3d 557 (Cal. Ct. App. 2011), *Lona v. Citibank, N.A.*, 134 Cal. Rptr.3d 622, 637 (2011), *GAR Energy & Associates, Inc. v. Ivanhoe Energy Inc.*, No. 1:11-CV-00907 AWI, 2011 WL 6780927, at *8 (E.D. Cal. Dec. 27, 2011), *report and recommendation adopted*, 2012 WL 174952 (E.D. Cal. Jan. 20, 2012). Indeed, as noted above, the panel's decision in this case does not even cite *Concepcion*.

This Court has repeatedly rejected such "generalized attacks on arbitration that rest on suspicion of arbitration as a method of weakening the protections afforded in the substantive law." *See, e.g., Green Tree Fin. Corp.-Ala.*, 531 U.S. at 89-90 (quotation omitted); *Circuit City Stores, Inc.* (mandatory arbitration agreements in the employment context fall under the FAA).

As Judge Easterbrook noted in *Oblix, Inc., v. Winiecki*, 374 F.3d 488 (7th Cir. 2004) , arbitration clauses usually are supported by consideration – in this case the consultant's compensation. Contracts typically contain "bundles of rights and obligations" of both parties. An arbitration clause is no more suspect, or any less enforceable, than the other provisions. Arbitration was as much a part of the meeting of the minds between MHN and the consultants as were the consultant's pay and benefits, confidentiality undertakings, and other terms.

Severance of provisions found to be illegal or unenforceable would give effect to the intent of the contracting parties, which was the "preeminent concern" of Congress in passing the FAA – "to enforce private agreements into which parties had entered." *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221 (1985); *see also Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. at 479 (1989) ("the FAA's primary purpose"

was to "ensur[e] that private agreements to arbitrate are enforced according to their terms").

Under the California standard, as applied by the lower courts in this case, the mere existence of multiple "unlawful provisions" allows a trial court to conclude that "the arbitration agreement is permeated by an unlawful purpose" and to deny severance. *See Armendariz*, 6 P.3d at 697); *see also Carmona v. Lincoln Millennium Car Wash, Inc.*, 171 Cal.Rptr.3d 42, 55 (Cal. Ct. App. 2014). *Armendariz* sets categorical requirements specific to arbitration clauses.[7] California's "two strikes

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[7] *Armendariz* sets forth four "minimum requirements for the arbitration of nonwaivable statutory claims," including claims of discrimination in employment asserted under the FEHA. *Armendariz*, 6 P.3d at 757-758, 766. First, the arbitration agreement "may not limit statutorily imposed remedies such as punitive damages and attorney fees." (*Id.* at 759.) Second, "adequate discovery is indispensable for the vindication of FEHA claims," and employees "are at least entitled to discovery sufficient to adequately arbitrate their statutory claim, including access to essential documents and witnesses...." (*Id.* at 760, 761.) Third, "in order for judicial review to be successfully accomplished, an arbitrator in a FEHA case must issue a written arbitration decision that will reveal, however, briefly, the essential findings and conclusions on which the award is based." (*Id.* at 762.) Fourth, "when an employer imposes mandatory arbitration as a condition of employment, the arbitration agreement or arbitration process cannot generally require the employee to bear any type of expense that the employee

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and you're out" rule as to arbitration agreements (*see Samaniego*, 140 Cal.Rptr.3d at 501 ("'An arbitration agreement can be considered permeated by unconscionability if it contains more than one unlawful provision . . . .'" (emphasis added)); *see also Lhotka v. Geographic Expeditions, Inc.*, 104 Cal.Rptr.3d 844, 853 (Cal. Ct. App. 2010); *Parada v. Super. Ct.*, 98 Cal.Rptr.3d 743, 769 (Cal. Ct. App. 2009), is clearly inimical to the principle that state law cannot disfavor arbitration.

In *Armendariz*, the California state court decision on which the Ninth Circuit grounded its decision here, the court refused to apply the FAA. Instead, it held that arbitration agreements should be reviewed with "a particular scrutiny." 6 P.3d at 757. It described arbitration as a potential

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[7](...continued)
would not be required to bear if he or she were free to bring the action in court." (*Id.* at 765, italics omitted.) The court in *Armendariz* further held that employer agreements purporting to require arbitration of nonwaivable statutory claims meeting these four "minimum requirements" must additionally be scrutinized under the principles of unconscionability "that apply more generally to any type of arbitration imposed on the employee by the employer as a condition of employment, regardless of the type of claim being arbitrated." (*Id.* at 766.) The California Supreme Court reiterated these principles of unconscionability applicable to arbitration agreements in *Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC*, 282 P.3d 1217 (Cal. 2012).

"instrument for injustice," *id.* at 768, and an "inferior forum," *id.* at 775, rife with "disadvantages that may exist for plaintiffs arbitrating disputes," *id.* at 770. Among these were "the fact that courts and juries are viewed as more likely to adhere to the law and less likely than arbitrators to 'split the difference' between the two sides, thereby lowering damages awards for plaintiffs." *Id.*

Armendariz openly displays the kind of hostility to arbitration that this Court has repeatedly criticized. In short, the rules derived from *Armendariz* – including the severance rule – do not treat arbitration agreements equally with ordinary contracts, as the FAA requires. *See, e.g.*, *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 266 (2009); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 30 (1991); *Shearson/Am. Express Inc. v. McMahon*, 482 U.S. 220, 231-32 (1987); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626-27 (1985).

As Circuit Judge Gould showed in his dissent, severance of the "offending" clauses would have given effect to the intent of the contracting parties and ensured that the essence of their agreement to arbitrate would be enforced. Applying a different rule to arbitration that treats arbitration agreements less favorably than other contractual

promises, as California does, and the Ninth Circuit did in this case, violates the FAA.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the Ninth Circuit.

Respectfully submitted,

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